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IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND 37 OTHER HIGHER EDUCATION ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND 37 OTHER HIGHER EDUCATION ORGANIZATIONS IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST[1]

Amici are 38 associations of colleges, universities, educators, trustees, and other representatives of higher education in the United States. *Amici* represent public, independent, large, small, urban, rural, denominational, non-denominational,

[1] No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No one other than *amici* or their members or counsel made a monetary contribution to the brief. All parties filed blanket *amicus* consent letters with the Clerk.

graduate, and undergraduate institutions and faculty. American higher education institutions enroll over 17 million students. For decades *amici* have worked to advance student diversity.

Amicus American Council on Education (ACE) represents all higher education sectors. Its approximately 1,700 members reflect the extraordinary breadth and contributions of degree-granting colleges and universities in the United States. Founded in 1918, ACE seeks to foster high standards in higher education, believing a strong higher education system to be the cornerstone of a democratic society. Among its initiatives, ACE had a major role in establishing the Commission on Minority Participation in Education and American Life, chaired by former Presidents Ford and Carter, which issued *One-Third of a Nation* (1988), a report on minority matriculation, retention, and graduation.

The Addendum contains information on the other *amici* on this brief.

SUMMARY OF ARGUMENT

A diverse student body is essential to educational objectives of colleges and universities. The Court held in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and reaffirmed in *Fisher* v. *University of Texas*, 133 S. Ct. 2411 (2013) ("*Fisher I*"), that higher education institutions have a compelling interest in educational benefit that flows from a diverse student body. That interest can justify narrowly tailored consideration of race in admissions as part of holistic review of individual applicants.

The interest in student diversity is compelling because grounded in educational benefit, and rooted in educational judgment. Although selective higher education institutions express student body diversity in various ways based on their respective educational missions, their basic objectives are the same—to admit and support a cohort of students whose "chemistry," individually and collectively, fosters exceptional learning. In *Regents of University of California* v. *Bakke*, 438 U.S. 265 (1978), *Grutter*, and *Fisher I*, the Court made clear that when a college or university sets its educational goals—including a goal of attaining the educational benefit of a diverse student body—it makes an educational judgment that merits judicial regard.

Whether a given mix of students " 'provide[s] that atmosphere which is most conducive to speculation, experiment, and creation' " involves considerations educators are best equipped to gauge. *Fisher I*, 133 S. Ct. at 2418 (citation omitted). A university properly may conclude not only that student body diversity in the abstract produces educational benefit, but also that a certain conception of diversity would produce the benefit it seeks. These are educational judgments. Under controlling precedent, colleges and universities may determine that a particular conception of diversity would best serve their educational goals.

Petitioner would have the Court superintend colleges' and universities' educational objectives and judgments. Rather than focus on whether the means fit the educational goals, she would change the focus to the goals themselves, asking courts to supervise and supersede educators' judgments about

educational objectives and the students who would best achieve them. That approach, at odds with controlling precedent, would dictate a single conception of sound educational policy for every college and university and truncate institutional pluralism, a hallmark of American higher education. Such homogeneity would be as untenable as it is impractical. Strict scrutiny does not require and should not tolerate that.

Colleges and universities do not have unfettered discretion. They must define their goals "by reference to the educational benefits that diversity is designed to produce." *Grutter*, 539 U.S. at 330. They must be able to articulate a "reasoned, principled explanation" for their academic decisions. *Fisher I*, 133 S. Ct. at 2419. Narrow tailoring asks whether "the means chosen by the University to attain diversity are narrowly tailored to that goal." *Fisher I*, 133 S. Ct. at 2420. This obligation is significant for colleges and universities. Its performance is subject to judicial review, a review that acknowledges the educational nature of the institution's judgment, but, where race is a consideration, also entails strict scrutiny.

Within those parameters, however, a university may appropriately conclude, in the exercise of its academic judgment, that consideration of race among many other characteristics in a holistic review of applicants is necessary to enable the institution to meet its educational objectives. Even under strict scrutiny, narrow tailoring should not be interpreted to forbid race-conscious holistic review merely because the review operates concurrently with race-neutral mechanisms.

ARGUMENT

I. THE COMPELLING INTEREST IN COMPOSITION OF A DIVERSE STUDENT BODY ENTAILS EDUCATIONAL JUDGMENT AND MERITS JUDICIAL REGARD.

Just three terms ago, *Fisher I* reaffirmed that obtaining the educational benefit a diverse student body produces is a compelling interest which can justify narrowly tailored consideration of race in college admissions. Grounded in educational benefit, the compelling interest requires educational judgment and merits judicial regard.

A. The Compelling Interest The Court Has Approved Is Educational.

1. Colleges And Universities Seek Student Body Diversity In Pursuit Of Educational Excellence.

The nation's colleges and universities seek student body diversity in pursuit of educational excellence. They must prepare students who will have to navigate a nation more diverse, and a world more interconnected, than ever before. Student body diversity is critical to the task.

To equip students to flourish in tomorrow's interconnected world, colleges and universities must stimulate students' thirst for the new and unfamiliar. Student body diversity catalyzes the exploratory spirit. "The experience of arriving on a campus to live and study with classmates from a diverse range of backgrounds is essential to students' training for this new world, nurturing in them an instinct to reach out instead of clinging to the

comforts of what seems natural or familiar." Lee C. Bollinger, *Why Diversity Matters*, Chronicle of Higher Education (June 1, 2007).

This acquired affinity for the unfamiliar enables students to contribute to economic, scientific, and social progress and to function in the global economy. A purpose of higher education is to equip professionals and business leaders to interact with diverse customers, clients, co-workers, and business partners. *See, e.g.*, Raymond V. Gilmartin, *Diversity and Competitive Advantage at Merck*, Harv. Bus. Rev. 146 (Jan. - Feb. 1999). As one business leader put it, "[o]ur success as a global community is as dependent on utilizing the wealth of backgrounds, skills and opinions that a diverse workforce offers, as it is on raw materials, technology and processes." William G. Bowen & Derek Bok, *The Shape of the River* 12 (1998) (quoting Robert J. Eaton, then Chairman and CEO of Chrysler Corporation).

Colleges and universities cannot claim to provide an excellent education if they send students into the world wearing blinders. So, too, in fields such as law, the natural sciences, and medicine, where international collaboration increasingly is indispensable, students today must receive direct experience with people of different backgrounds, including race and ethnicity. Students cannot adequately acquire it from books, and they will sorely need it. *See* Arthur H. Compton, *Foreword to* Huston Smith, *The Purposes of Higher Education* xiv (1955).

Student body diversity also contributes vitally to the process of learning, on which the powers of

reason depend. A longstanding precept of developmental psychology is that we learn by formulating, revising, and refining conceptions of the world each time we encounter new facts, beliefs, experiences, and viewpoints. *See, e.g.*, Peter B. Pufall, *The Development of Thought: On Perceiving and Knowing, in* Robert Shaw & John Bransford, *Perceiving, Acting, and Knowing: Toward an Ecological Psychology* 173-174 (1977). Faced with new information, students either assimilate it to fit the existing conception, or revise the conception to accommodate the new information. This "disequilibration," as Jean Piaget called it, and the subsequent restoration of cognitive balance, force learners to refine their thinking. Piaget taught that "disequilibration" experiences have greatest impact when they come from "social interaction." Jean Piaget, *Piaget's Theory, in* 1 *Carmichael's Manual of Child Psychology* (P. H. Mussen ed., 3d ed. Wiley 1970). A student, confronted by a peer who has a new or unexpected perspective on the world, meets that perspective as an equal, and can explore and absorb it more fully than if merely informed of it in, for example, a lecture. *See, e.g.*, Diane N. Ruble, *A Phase Model of Transitions: Cognitive and Motivational Consequences*, 26 Advances in Experimental Social Psych. 163, 171 (1994). Colleges and universities supply and catalyze "that collision which is obtained only in society and by which a knowledge of the world and its manners is best acquired." F.W. Garforth, *Educative Democracy: John Stuart Mill on Education in Society* 164 (1980) (citing David Ricardo).

These bedrock principles of developmental psychology, to which educators at all levels

subscribe, teach that exposing students to an array of peer life experiences and perspectives is critical to learning. The familiar is less valuable; it tends to reinforce preconception. But the new and different are food for intellectual growth. Student diversity provides all learners opportunities to develop their intellects, through exposure to increasingly complex and nuanced models presented by peers. These new perspectives and experiences are especially educational when encountered in direct interaction with a peer, because peer encounters entail the give-and-take and the emotional processes that promote complex thinking.

Interaction among students from diverse backgrounds exposes each to a broader array of vantage points from which to view his or her own values than does interaction among like-minded students whose experiences are similar. Of course, students will not and should not always accept new perspectives and abandon their own. Higher education teaches students to employ reason to decide for themselves which of their beliefs to retain, and which to cast aside in favor of other discovered truths. And students in diverse institutions often learn that anticipated differences in perspectives or views do not exist, or do not correlate as expected with race or ethnicity. Preconception is thereby dispelled, and stereotype is thereby rebutted.

Student body diversity thus awakens students from the sleepy "unexamined life" of which Socrates warned. It also prepares students for citizenship and enables students to overcome barriers that separate them from one another, divide them from the world they need to know, and impede their intellectual

growth. It is in pursuit of such educational benefit that colleges and universities strive to recruit, admit, and retain a diverse student body.

2. The Court Has Repeatedly Recognized The Educational Value Of A Diverse Student Body.

The Court has three times recognized as compelling the educational benefit that flows from a diverse student body. In *Regents of University of California* v. *Bakke*, the Court reversed an injunction that barred the State from "ever considering the race of any applicant." 438 U.S. at 320 (opinion of the Court). Justice Powell explained that "in arguing that its universities must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas,' * * * petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission." *Id.* at 313.

The Court elaborated twenty-five years later in *Grutter*. At issue was the University of Michigan Law School's use of race as a means to "obtain[ ] 'the educational benefits that flow from a diverse student body.' " 539 U.S. at 328 (citation omitted). The Law School explained that student body diversity was " 'of paramount importance in the fulfillment of its mission.' " Br. for Respondents in No. 02-241, at 28 (quoting *Bakke*, 438 U.S. at 313 (opinion of Powell, J.)). A racially integrated learning environment helped its students "learn how to bridge racial divides, work sensitively and effectively with people of different races, and simply overcome the initial discomfort of interacting with people visibly different

from themselves that is a hallmark of human nature." *Id.* at 25.

The Court upheld the Law School's admissions policy and endorsed the pursuit of diversity in higher education. Echoing Justice Powell's *Bakke* opinion, the Court held that higher education institutions have a compelling interest in "obtaining the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 343; *see also Bakke*, 438 U.S. at 314 (opinion of Powell, J.) ("the interest of diversity is compelling in the context of a university's admissions program"). Those benefits, the Court recognized, are "substantial." *Grutter*, 539 U.S. at 330. "[N]umerous studies show that student body diversity promotes learning outcomes, * * * 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" *Id.* (citation omitted).[2] Diversity also promotes cross-racial understanding, helps to

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[2] Research findings that support this conclusion have grown more robust since 2003. *See, e.g.*, A.L. Antonio *et al.*, *Approaching Diversity Work in the University: Lessons from an American Context*, in *As the World Turns: Implications of Global Shifts in Higher Education for Theory, Research and Practice* 371–401 (Walter R. Allen *et al.* eds. 2012); S. Hurtado & L. D'Angelo, *Linking Diversity and Civic-Minded Practices with Student Outcomes: New Evidence from National Surveys*, 98 Liberal Education 2 (2012); N. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 Review of Educational Research 4 (2010); N. Denson & M.J. Chang, *Racial Diversity Matters: The Impact of Diversity-Related Student Engagement and Institutional Context*, 46 American Educational Research Journal 322 (2008); N. Gottfredson *et al.*, *Does Diversity at Undergraduate Institutions Influence Student Outcomes?*, 1 Journal of Diversity in Higher Education 80 (2008).

break down stereotypes, and enables students to understand better those who are different. *Id.* To seek these benefits through diversity is properly understood to be at the core of institutions' academic mission. *Id.* at 329.

As the Court in *Grutter* observed, the educational benefit of diversity is "not theoretical but real." *Id.* at 330. Although it canvassed evidence that demonstrates the benefit of diversity in higher education, the Court did not purport to weigh that evidence *de novo*. Such an exercise would have been misguided, for judges are ill-equipped to assess the merits of particular educational approaches. *See Regents of Univ. of Mich.* v. *Ewing*, 474 U.S. 214, 226 (1985). Universities themselves have the "experience and expertise" to make educational judgments. *Grutter*, 539 U.S. at 333. Accordingly, the Court accepted the Law School's judgment that attaining student body diversity was essential to its educational mission. *Id.* at 328.

In *Fisher I*, the Court reaffirmed that "the decision to pursue 'the educational benefits that flow from student body diversity,' that the University deems integral to its mission is, in substantial measure, an *academic judgment* to which some, but not complete, judicial deference is proper under *Grutter*." 133 S. Ct. at 2419 (italics added) (citation omitted). "A court, of course, should ensure that there is a reasoned, principled explanation for the decision." *Id.*

Such regard is particularly appropriate in light of the "special niche" universities occupy in the American constitutional tradition. *Grutter*, 539 U.S.

at 329. The Constitution protects universities' freedom to define and pursue educational goals. *See, e.g.*, *Ewing*, 474 U.S. at 225; *Bd. of Curators of Univ. of Mo.* v. *Horowitz*, 435 U.S. 78, 96 n.6 (1978); *Bakke*, 438 U.S. at 319 n.53 (opinion of Powell, J.). Academic freedom extends beyond scholarship to governance by the academies themselves, including control over the composition of the student body. *Grutter*, 539 U.S. at 329 (citing *Bakke*, 438 U.S. at 312 (opinion of Powell, J.)); *see also Edwards* v. *Cal. Univ. of Penn.*, 156 F.3d 488, 492 (3d Cir. 1998) (Alito, J.).

B. To Compose An Entering Class Likely To Produce The Benefit Of Diversity Entails Institution-specific Educational Judgments.

While the means chosen to pursue diversity are subject to judicial scrutiny, the Court should reaffirm that higher education institutions make educational judgments not only with respect to the overarching goal of achieving the educational benefit of a diverse student body, but also with respect to determining how that principle shall govern particular institutional contexts. To compose an entering class is an art that requires educational judgment at every step.

Determinations about what kinds of diversity, and how much, a higher education institution needs to achieve the educational benefit sought entail quintessential academic judgment. *Grutter*, 539 U.S. at 328-329, 333. Because it is at the heart of "a university's definition of its educational objective," *id.* at 388 (Kennedy, J. dissenting), diversity is best defined by an institution for itself, in accordance

with its mission and concept of education. The constitutionally protected freedom to assemble a diverse student body would amount to little if it did not include the freedom to define the diversity sought.

Grutter endorsed judicial regard for an institution's own conception of diversity. The University of Michigan Law School identified one particular conception of diversity—" 'enroll[ing] a "critical mass" of minority students' "—and determined that attaining critical mass was "necessary to further its compelling interest in securing the educational benefits of a diverse student body." 539 U.S. at 329, 333 (quoting Br. for Respondent in No. 02-241, at 13). The Court accepted that judgment, based in part on the Law School's "experience and expertise" within the educational realm. *Id.* But one law school's particular judgment about what type of diversity to pursue in light of its mission does not bind every other college and university in the nation.

The First Amendment affords *each* institution "particular latitude in defining diversity." *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 792 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("*PICS*"); *see also Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting) (distinguishing permissible "deference to a university's definition of its educational objective" from impermissible "deference to the implementation of this goal"). What constitutes diversity sufficient for the educational objectives of one school may not be suitable at another.

Judicial regard is owed educators' educationally derived conceptions of diversity because such matters require evaluation of cumulative information for which those responsible for higher education are best qualified. *See Ewing*, 474 U.S. at 226. The mix of students that affects learning involves considerations educators are best equipped to gauge.

Such judgments often start with institutional mission and context. The educational experience a small New England liberal arts college aims to impart may call for a student body different from that appropriate for a flagship state university. Such judgments also require understanding of campus and pedagogical dynamics, cognitive processes, and ways to nurture students' capacity for moral reasoning, along with other specialized knowledge in which educators are trained. Institutions seek to build the strongest possible class—the class most conducive to mission and learning—in a fast-moving, ever-changing competitive context. They may consider, for example, maintaining and improving academic strength under traditional measures (such as test scores and grades); need to fill various academic and cocurricular programs (such as athletics and arts); likelihood of enrollment by admitted students at a given institution; and other factors. Institutions consider those factors in light of unique, evolving institutional contexts. These "complex educational judgments" lie "primarily within the expertise of the university." *Grutter*, 539 U.S. at 328.

Selective institutions typically have many more qualified applicants than spaces; and applications

rarely tell the "whole story." For instance, grades from different schools have differing significance, and scores on standardized tests may not correlate with the applicant's academic motivation or potential. Confronted with this challenge, many selective institutions engage in holistic review. *See, e.g.*, Lorelle L. Espinosa, Matthew N. Gaertner, and Gary Orfield, *Race, Class, & College Access: Achieving Diversity in a Shifting Legal Landscape*, 57, Appendix B (2015) ("*Race, Class* ").

Holistic review respects each applicant's individuality in light of the totality of circumstances, and assesses the fit between the applicant, the institution, and the class under construction. Based on their knowledge of the institution's mission and experience as educators, admissions officers appraise the applicants most likely to benefit from the institution's educational offerings and to contribute to its educational environment. The goal is a new class that will produce a vibrant community for learning.

Moreover, the ultimate educational judgment as to who is admitted is a judgment without an unarguably right or wrong answer. As Princeton University explains: "Most of our applicants are well qualified for Princeton. Since the admission staff must select a freshman class from an abundance of highly able and accomplished candidates, and since all applicants are compared to the entire applicant pool, it is extremely difficult to explain why any one student is refused." Princeton University, The Admission Decision, https://admission.princeton.edu/applyingforadmissio

n/admission-faqs/admission-decision (last visited Oct. 10, 2015).

Neither the judiciary nor government departments are as qualified as are educators to assess the mix of applicants most likely to catalyze the highest levels of learning. The Court has rejected any requirement that an institution must define its interest in even measurable terms. As the Court stated in *Gratz*, "Petitioners further argue that 'diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means.' But for the reasons set forth today in [*Grutter*], the Court has rejected these arguments of petitioners." *Gratz* v. *Bollinger*, 539 U.S. 244, 268 (2003) (citations omitted). Judicial scrutiny is "no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university." *Grutter*, 539 U.S. at 328.

C. Judicial Regard For These Educational Judgments Undergirds The Finest Higher Education System In The World.

American higher education is preeminent in the world and a beacon to other countries. *E.g.*, Ian Wilhelm, "U.S. Is Ranked as Top Higher-Education System in the World," *The Chronicle of Higher Education* (May 14, 2014). In no small measure, that standing derives from America's decentralized higher education system in which institutions pursue their respective missions in their respective ways. Such institutional pluralism has flourished in consequence of a tradition of government forbearance that is at

least as old as the nation. *See, e.g.*, 1 Richard Hofstadter and Wilson Smith eds., *American Higher Education: A Documentary History* 157 (1961) (during George Washington's administration, Congress refused to establish a national university that would set federal standards for all new colleges and universities); *Trs. of Dartmouth Coll.* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819); 20 U.S.C. § 1232a.

Courts are not "suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'" *Ewing*, 474 U.S. at 226 (citation omitted).

For courts to override educators' reasoned judgment on how and what kinds of diversity yield educational benefit would truncate American colleges' and universities' historic right to assemble students in a way that fits the institutions' educational philosophies and contexts—philosophies and contexts that with salutary effect are themselves extraordinarily varied. *See* Carnegie Comm'n on Higher Educ., *Reform on Campus: Changing Students, Changing Academic Programs* 35 (1972). Determinations of the contours of the compelling interest in diversity are rooted in educational judgment that merits judicial regard. *See Ewing*, 474 U.S. at 226, n.12 (explaining the authority of colleges and universities extends to "autonomous decisionmaking by the academy itself").

II. NARROW TAILORING ASSESSES MEANS, NOT ENDS.

Petitioner argues that the top 10% plan generated sufficient diversity and made the University of Texas's race-conscious holistic review unnecessary. Pet. Br. at 45-46. That argument misreads *Fisher I*'s call for narrow tailoring. Petitioner asks the courts to appraise and recast for themselves each college's and university's compelling interest in student diversity. That course of action would truncate institutional pluralism, a hallmark of American higher education. Strict scrutiny does not require and should not tolerate that result.

A. The Proper Analysis Is Whether The Means Chosen By The Institution To Attain Diversity Are Narrowly Tailored To The Goal.

Narrow tailoring asks whether "the means chosen by the University to attain diversity are narrowly tailored to that goal." *Fisher I*, 133 S. Ct. at 2420. The question requires "careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications" at "'tolerable administrative expense.'" *Id.* (citation omitted).

Thus, the goal—the compelling interest—informs the narrow tailoring inquiry. The compelling interest in securing the educational benefit of a diverse student body is "complex." *Id.* at 2418. It "'encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.'" *Id.* (quoting *Bakke*, 438 U.S. at 315 (opinion of Powell,

J.)). As Part I addresses, colleges and universities must consider which particular conception of diversity will best serve their educational goals. Such determinations are contextual. They are specific to each institution. They may change over time. They warrant judicial regard.

Colleges and universities do not have unfettered discretion to make such determinations. They must be able to articulate a "reasoned, principled explanation" for their academic decisions. *Fisher I*, 133 S. Ct. at 2419. And they may not define diversity in numeric terms. *See, e.g.*, *id.* ("A university is not permitted to define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.' ") (citation omitted). Even quantitative critical-mass targets can cause Constitutional concern. *E.g.*, *Grutter*, 539 U.S. at 392 (use of daily reports could be used to "recalibrate the plus factor given to race depending on how close they were to achieving the Law School's goal of critical mass. The bonus factor of race would then become divorced from individual review; it would be premised instead on the numerical objective set by the Law School") (Kennedy, J., dissenting); *cf. Gratz*, 539 U.S. at 271 (no "single characteristic" should automatically ensure a "specific and identifiable contribution to a university's diversity").

Petitioner now asks the Court to endorse an approach that would allow judges to do in litigation what institutions may not do in admissions—define how much diversity is enough by drawing a numeric

line based on strict racial demographics.[3] *Cf. PICS*, 551 U.S. at 723 ("The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be 'patently unconstitutional.' ") (citation omitted).

Under Petitioner's approach, case law could develop national standards for the amount and kind of diversity that suffices. Such national standards would trench on both the professional judgment of educators and institutional pluralism. Petitioner's approach could leave institutions paralyzed, unsure whether and when a court would nullify and supersede their educational judgments and by what measure. Strict scrutiny must not become " 'strict in theory, but fatal in fact.' " *Grutter*, 539 U.S. at 326 (citation omitted).

B. Race-neutral Alternatives Are Inappropriate If They Thwart An Institution's Educational Judgments.

Narrow tailoring requires a court to satisfy itself that workable race-neutral approaches would not produce the educational benefit of diversity. *Fisher I*, 133 S. Ct. at 2420. An alternative is workable when it would achieve the educational benefit of

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[3] Pet. Br. at 45–46 (arguing the University of Texas "has not met its burden of demonstrating why it has not yet achieved critical mass" and that "UT's own admissions statistics demonstrate that UT effectively achieved critical mass no later than 2003, the last year it employed its race neutral admissions plan").

diversity " 'about as well' " as race-conscious means at " 'tolerable administrative expense.' " *Id.* (citation omitted).

The Court should reaffirm its precedent that narrow tailoring does not require a college or university to pursue race-neutral alternatives that would thwart its educational objectives. *See Grutter*, 539 U.S. at 340 ("We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission."). These judgments relate to the institution's mission and vary from school to school.

An open enrollment or lottery system might yield student body diversity, but would eliminate an institution's opportunity to select the most talented students who are best equipped to learn with and from one another. Such a system would frustrate any selective institution's mission. Strict scrutiny does not and should not require exhaustion of race-neutral alternatives that thwart the institution's educational judgments.

C. Narrow Tailoring Should Not Be Interpreted To Forbid Race-conscious Holistic Review Simply Because The Review Operates Concurrently With Race-neutral Mechanisms.

Colleges and universities that seek the educational benefit of diversity commonly use race-neutral strategies, such as targeted recruitment or community college transfer programs, together with

race-conscious holistic review. *E.g.*, *Race, Class*, at iv ("Institutions that consider race in admissions decisions use other race-conscious and race-neutral diversity strategies more often and find them more effective than institutions that use race-neutral strategies alone."); *id.* at 27-28, 57 (identifying more than 15 race-neutral strategies).

It can be difficult to disentangle with confidence the effect of various strategies to admit a diverse student body. Narrow tailoring should not be interpreted to forbid race-conscious holistic review merely because race-neutral tools contribute to success in achieving unquantifiable goals.

For example, a small, selective institution might create a transfer program from community colleges in nearby cities. That program might ultimately generate in numeric terms a significant number of students from an underrepresented minority group. But that fact alone should not stop the institution from concluding that the educational benefit of diversity would be well-served by admitting students of the same minority group who grew up in other parts of the country, including through race-conscious holistic review.

"Context matters" when applying strict scrutiny. *Grutter*, 539 U.S. at 327. A selective institution's difficult educational judgments, in which race is one factor of many that bear on applicants' relative potential contributions to a class, are altogether different than a school district's assignment of students to elementary school on the basis of "a crude system of individual racial classifications" in which race decides every contested case. *See PICS*,

551 U.S. at 789 (Kennedy, J. concurring in part and concurring in the judgment). Holistic review involves no "[r]eduction of an individual to an assigned racial identity for differential treatment" or telling "each student he or she is to be defined by race." *Id.* at 789, 795. Rather, holistic review involves considering a student's race as one small part of an overall (if imperfect) assessment of the student's likely contribution to a vibrant educational environment in a nation in which the "enduring hope is that race should not matter; the reality is that too often it does." *Id.* at 787.

CONCLUSION

For the foregoing reasons, the Court should affirm that the University of Texas's determination of its student diversity goal and progress toward that goal merit judicial regard, and that no one conception of student diversity binds all of American higher education.

Respectfully submitted,

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ADDENDUM

ADDENDUM: *AMICI* ON THIS BRIEF

- The American Council on Education is described at page 2 of this brief.
- The Accreditation Council for Pharmacy Education (ACPE) is the national agency for the accreditation of professional degree programs in pharmacy and of providers of continuing pharmacy education.
- The American Anthropological Association (AAA) represents more than 11,000 archaeologists and anthropologists in the academy and practice.
- The American Association of Community Colleges (AACC) is the primary advocacy organization for the nation's community colleges. It represents nearly 1,200 two-year, associate degree-granting institutions.
- The American Association of State Colleges and Universities (AASCU) includes as members more than 400 public colleges, universities, and systems whose members share a learning- and teaching-centered culture, a historic commitment to underserved student populations, and a dedication to research and creativity that advances their regions' economic progress and cultural development.
- The American Association of University Professors (AAUP) represents the interests of over 40,000 faculty, librarians, graduate students, and academic professionals. AAUP defends academic freedom and the free exchange of ideas in higher education.

- The American College Personnel Association (ACPA) is the largest comprehensive student affairs association that advances student affairs and engages students for a lifetime of learning and discovery. ACPA, with almost 8,000 members, supports and fosters college student learning through the generation and dissemination of knowledge, which informs policies, practices, and programs for student affairs professionals and the higher education community.

- The American Indian Higher Education Consortium (AIHEC) is the unifying voice of our nation's 37 Tribal Colleges and Universities—federally recognized public institutions working to strengthen tribal nations and make a lasting difference in the lives of American Indians and Alaska Natives. Through public policy, advocacy, research, and program initiatives, AIHEC strives to ensure strong tribal sovereignty through excellence in American Indian higher education.

- The American Speech-Language-Hearing Association (ASHA) is the national professional, scientific, and credentialing association for 182,000 members and affiliates who are audiologists; speech-language pathologists; speech, language, and hearing scientists; audiology and speech-language pathology support personnel; and students.

- The APPA, "Leadership in Educational Facilities" (APPA) promotes leadership in educational facilities for its more than 5,200 professional

members throughout the United States, Canada, and abroad.

- The Association of American Colleges and Universities (AAC&U) has more than 1,300 member institutions, including accredited public and private colleges, community colleges, and universities of every type and size. Its mission is to reinforce commitment to liberal education and inclusive excellence, and help institutions prioritize the quality of student learning.

- The Association of American Universities (AAU) is an association of 62 leading public and private research universities in the United States and Canada. Founded in 1900 to advance the international standing of U.S. research universities, AAU today focuses on issues that are important to research-intensive universities, such as funding for research, research policy issues, and graduate and undergraduate education.

- The Association of Community College Trustees (ACCT) represents over 6,000 board members who govern community, technical, and junior colleges.

- The Association of Governing Boards of Universities and Colleges (AGB) serves the interests and needs of academic governing boards, boards of institutionally related foundations, and campus CEOs and other senior-level campus administrators on issues related to higher education governance and leadership. Its mission is to strengthen, protect, and advocate on behalf of citizen trusteeship that supports and advances higher education.

- The Association of Jesuit Colleges and Universities (AJCU) represents all 28 Jesuit institutions in the U.S. and is affiliated with over 100 Jesuit institutions worldwide. The first Jesuit institution opened in 1548 in Messina, Sicily, and Jesuit institutions remain committed to academic rigor, with a focus on quality teaching, learning, and research to educate the whole person.

- The Association of Public and Land-grant Universities (APLU) is a research, policy, and advocacy organization with a membership of 237 public universities in all 50 states and the District of Columbia (as well as 13 in Canada and Mexico), land-grant institutions, state university systems, and affiliated organizations.

- The Association of Research Libraries (ARL) is a nonprofit organization of 124 research libraries at comprehensive, research institutions in the U.S. and Canada that share similar research missions, aspirations, and achievements.

- The Association to Advance Collegiate Schools of Business (AACSB) represents more than 1,400 business schools worldwide in 90 countries and territories. Its mission is to advance quality management education worldwide through accreditation, thought leadership, and value-added services.

- The College and University Professional Association for Human Resources (CUPA-HR), the voice of human resources in higher education, represents more than 14,000 human-resources professionals at over 1,800 colleges and

universities. Its membership includes 92 percent of all United States doctoral institutions, 75 percent of all master's institutions, 60 percent of all bachelor's institutions, and nearly 600 two-year and specialized institutions.

- The Commission on Institutions of Higher Education of the New England Association of Schools and Colleges (CIHE of NEASC) accredits 240 colleges and universities in the six New England states.

- The Council for Advancement and Support of Education (CASE) is a professional association serving educational institutions and the advancement professionals who work on their behalf in alumni relations, communications, development, marketing, and allied areas. CASE helps its members build stronger relationships with their alumni and donors, raise funds for campus projects, produce recruitment materials, market their institutions to prospective students, diversify the profession, and foster public support of education.

- The Council of Graduate Schools (CGS) is an organization of institutions of higher education in the United States, Canada, and across the globe engaged in graduate education, research, scholarship, and the preparation of candidates for advanced degrees.

- The Council of Independent Colleges (CIC) is an association of 755 nonprofit independent colleges and universities and higher education affiliates and organizations that works to support college and university leadership, advance institutional

excellence, and enhance public understanding of private higher education's contributions to society. CIC conducts the largest annual conferences for presidents and chief academic officers, and supports state fundraising associations that organize programs and generate contributions for private colleges.

- EDUCAUSE is an association of over 2,400 colleges, universities, and related organizations whose mission is to advance higher education through the use of information technology

- The Graduate Management Admission Council (GMAC) is an organization of more than 200 leading graduate management school members located in the United States and worldwide. It owns and administers the GMAT® exam and provides research and market intelligence, marketing and recruiting tools and programs, worldwide professional development opportunities, and innovative grant initiatives designed to serve the graduate management community.

- The Group for the Advancement of Doctoral Education in Social Work is an organization made up of over 80 social work doctoral program directors worldwide who represent their member Universities. GADE's primary purpose is to promote excellence in doctoral education in social work, especially through networking, information sharing, and advocacy.

- The Hispanic Association of Colleges and Universities (HACU), founded in 1986, represents more than 400 colleges and universities

committed to Hispanic higher education success in the U.S., Puerto Rico, Latin America, and Spain.

- The Middle States Commission on Higher Education (MSCHE) is a regional accrediting agency that accredits a diverse group of 534 colleges and universities located in New York, New Jersey, Pennsylvania, Maryland, Delaware, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and some international locations.

- The National Association for Equal Opportunity in Higher Education (NAFEO) is the umbrella organization of the nation's Historically Black Colleges and Universities and Predominantly Black Institutions. It represents the presidents and chancellors of the diverse black colleges and universities: public, private, and land-grant, two-year, four-year, graduate, and professional, historically and predominantly black colleges and universities

- The National Association of College and University Business Officers (NACUBO) represents more than 2,500 colleges, universities, and higher education service providers. It represents chief business and financial officers through advocacy efforts, community service, and professional development activities. NACUBO's mission is to advance the economic viability and business practices of higher education institutions in fulfillment of their academic missions.

- The National Association of Diversity Officers in Higher Education (NADOHE) is the leading voice

of chief diversity officers in higher education. Its membership includes almost 200 colleges and universities, as well as individual members, affiliated professional organizations, and two formal state chapters.

- The National Association of Independent Colleges and Universities (NAICU) has more than 1,000 member institutions and associations and serves as the unified national voice of independent higher education, reflecting the diversity of private, nonprofit higher education in the United States. NAICU's 963 member institutions, which serve more than three million students, include major research universities, church-related colleges, historically black colleges, art and design colleges, traditional liberal arts and science institutions, women's colleges, two-year colleges, and schools of law, medicine, engineering, business, and other professions

- The National Association of Student Financial Aid Administrators (NASFAA) represents more than 18,000 student financial assistance professionals at nearly 2,800 institutions of higher education, serving over 16 million students. It supports the training, diversity, and professional development of financial aid administrators; advocates for public policies and programs that increase student access to and success in postsecondary education; and serves as a forum for communication and collaboration on student financial aid issues.

- The National Collegiate Athletic Association (NCAA) serves as the organizing, regulating, and

standard-setting body for 23 intercollegiate sports. The NCAA's active membership includes over 1,000 institutions of higher education that jointly create seasons of amateur intercollegiate competition across three Divisions.

- The Southern Association of Colleges and Schools Commission on Colleges (SACSCOC) is the regional body for the accreditation of degree-granting higher education institutions in 11 Southern states. Its mission is the enhancement of educational quality throughout the region, and it strives to improve the effectiveness of institutions by ensuring that institutions meet standards established by the higher education community that address the needs of society and students.

- Student Affairs Administrators in Higher Education (NASPA) is the leading association for the advancement, health, and sustainability of the student affairs profession. It serves a full range of professionals who provide programs, experiences, and services that cultivate student learning and success in concert with the mission of our colleges and universities. NASPA has more than 13,000 members in all 50 states, 29 countries, and 8 U.S. Territories.

- The Thurgood Marshall College Fund (TMCF) is the only national organization founded for the sole purpose of providing scholarships to students attending the nation's public Historically Black Colleges and Universities. In addition to scholarships, TMCF provides leadership development, and training as well as

programmatic and capacity building and policy and advocacy support to its member schools.

- The WASC Senior College and University Commission is a regional accrediting agency serving a diverse membership of public and private higher education institutions throughout California, Hawaii, and the Pacific as well as a limited number of institutions outside the U.S.